STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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Investigation Into Tariff Providing	)	
Unbundled Local switching With	)	
Shared Transport	)	

BRIEF ON EXCEPTIONS AND EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

MATTHEW L. HARVEY
DAVID A. NIXON
MARGARET T. KELLY
MARY J. STEPHENSON
OFFICE OF GENERAL COUNSEL
ILLINOIS COMMERCE COMMISSION
160 NORTH La SALLE STREET
STE. C-800
CHICAGO, ILLINOIS 60601
(312) 793-2877

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The Staff of the Illinois Commerce Commission (hereafter "the Staff"), pursuant to Section 200.830 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Admin. Code 200.830, as its Brief on Exceptions herein, states as follows:

Introduction

In general, the Staff views the Proposed Order as strong in its conclusions. The Proposed Order quite properly rejects out of hand Ameritech's ULS rate structure. Proposed Order at 4-6. Likewise, the Proposed Order finds, correctly, that Ameritech's cost studies supporting its proposed ULS-ST rates are deeply flawed, in a manner that tends to increase those rates. Id. at 21. Further, the Proposed Order rightly determines that Ameritech improperly allocated the costs of custom routing of OS and DA with ULS-ST via AIN. Id. at 23.

However, the Staff takes issue with several of the Proposed Order's conclusions. Most significantly, the Proposed Order declines to adjust Ameritech's joint and common cost allocation, despite the clear need to do so. Proposed Order at 27. In addition, the Proposed Order determines, incorrectly, that the issue of whether Ameritech should be required to offer ULS-ST to carriers seeking to provide intraLATA toll service, or serve new and second lines, is beyond the scope of this docket. Id. Finally, the Proposed Order declines to address the issue of transiting, again incorrectly concluding that this issue does not fall within the scope of the proceeding. Id.

In addition, the Staff is compelled to take exception to certain of the Proposed Order's reasoning, even where it reaches the correct conclusion on the

ultimate issue, and to perhaps a lesser degree with the measures it proposes to implement those conclusions. Most specifically, the Staff takes exception to the Proposed Order's reasoning in support of its decision to reject Ameritech's ULS-ST studies, and in support of its adoption of Dr. Ankum's rates structure for ULS-ST. The Staff is convinced that the Proposed Order's reasoning, while advanced in support of an impeccable conclusion, is materially flawed and in need of revision. Accordingly, the Staff takes the following exceptions to the Proposed Order.

Exceptions

Exception No. 1 On the Issue of Ameritech's ULS-ST Cost Studies, the Proposed Order's Ultimate Conclusion, While Correct, is Improperly Reasoned

While Staff agrees with the Proposed Order's ultimate conclusion on this point, Staff disputes the stated reasoning supporting this conclusion. Staff's concern is that the Proposed Order's reasoning starts from an incorrect factual basis. With respect to Ameritech's cost studies supporting its proposed ULS-ST rates, the Proposed Order finds that:

> The primary flaw in Ameritech's ULS study was its failure to account for some 14 million lines that its switches serve and the fact that approximately 70% of those lines were replacement lines…[.]
> … [T]he CLECs noted [that] the "T" in TELRIC contemplates cost recovery across the total demand for a given service, in this case all access lines in Ameritech's service territory. Once the remaining lines are included in the calculation, we agree with Dr. Ankum that the proper weighting is 30% growth lines and 70% replacement lines. This conclusion is consistent with the weighting of growth and replacement lines in the ULS study that Ameritech conducted in Michigan and we find it reasonable and based on the record evidence.
>
> Proposed Order at 21.

The Proposed Order is not correct in its reasoning on this point, mostly because its reasoning starts from an incorrect factual basis. In fact, Ameritech did indeed include the 14 million access lines in its TELRIC analysis. The Proposed Order's conclusion on this point appears to stem from a misunderstanding of the ARPSM model, and precisely what that model is intended to accomplish. The Proposed Order's conclusion is based on the mistaken belief that Dr. Ankum derived the 73-27% ratio by including the remaining (14 million) lines into ARPSM.

The ARPSM model is intended to calculate a single price equivalent for ULS as an input to a computation of per-line (or, pursuant to Ameritech's recommendation, a per-minute-of-use) TELRIC for ULS-ST. Staff Ex. 3.0 at 7; Ex. 7 at 10; Ameritech Ex. 2.1 at 20. Thus, the exclusion of replacement lines in using ARPSM to calculate the single price equivalent does not necessarily result in the exclusion of these lines from the TELRIC calculation. Notwithstanding the factual error identified above, the ultimate conclusion reached in the Proposed Order to reject Ameritech's ULS-ST studies, remains correct for the reasons identified below. Staff, however, does not support the Proposed Order's acceptance of the methodology used by Dr. Ankum to support his rate structure for ULS-ST.

A. Staff's Proposal Is Disinterested, And The Proposed Order Improperly Rejects It In Favor Of That Recommended The CLECs

1. *Both Ameritech and CLECs' proposed methodologies to calculate TELRIC prices involve gaming the proportion of new and additional lines to produce biased TELRIC prices in this proceeding*

Staff agrees with the Proposed Order that TELRIC pricing should reflect the entirety of Ameritech's network architecture. A sound TELRIC study should aim to prevent gaming by either party (CLEC or ILEC). Ameritech has incentives to bias the TELRIC price toward the growth price. Similarly, CLECs are motivated to bias the TELRIC price toward the replacement price, which is substantially lower than the growth price. Staff, not driven by such incentives[1], has tried to develop a just and reasonable TELRIC price that is based on the proportion of new and additional lines over time. As argued below, Ameritech and Dr. Ankum's proposed approaches are biased to their respective advantages.

Ameritech used line counts that it planned to purchase during this contract period in its ARPSM (to calculate the would-be single market prices --- i.e., the single price equivalent). The 1A analog switch replacement process is near its end, and the lines on the remaining 1A analog switches are very limited and so are the lines to be purchased as replacement lines during the contract period used in this proceeding. Thus the resulting TELRIC prices tend to be upward-biased or heavily weighted toward the growth line prices.

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[1] *Cf.* This is Spinal Tap, 1984. "David [St. Hubbins] and Nigel [Tufnel] are like poets, you know, like Shelly or Byron, or people like that. The two totally distinct types of visionaries, it's like fire and ice, and I feel my role in the band is to be kind of in the middle of that, kind of like lukewarm water." Derek Smalls, bass player.

Dr. Ankum's proposed methodology, in contrast, tends to be biased in the opposite direction. Dr. Ankum replaced all lines at the beginning and estimates future growth lines. Because Dr. Ankum underestimates growth lines, Dr. Ankum's approach produces under-stated TELRIC prices. While Ameritech proposed approach produces over-stated TELRIC prices, Dr. Ankum's approach produces under-stated TELRIC prices.

2. Ameritech and Dr. Ankum's methodology fail to reflect the time trend in switch costs

TELRIC prices generated by sound TELRIC studies should reflect any time trend in the underlying switch costs. That is, if switch costs remain constant over time, TELRIC prices generated at different points in time should reflect this constancy in switch costs. If switch costs decline over time, TELRIC prices should reflect this time trend in switch costs as well. Neither Ameritech nor Dr. Ankum have proposed a methodology that reflects the time trend in switch costs.

As noted above, Ameritech's TELRIC prices are contingent on the state of the switch replacement process, as well as switch costs, and it may not reflect the time trend of the switch costs. To illustrate this, one should assume switch costs remain constant over the next 10 years. The TELRIC prices associated with the TELRIC study in 5 or 10 years based on Ameritech's approach may be higher or lower than the TELRIC prices generated in this proceeding. This is simply because Ameritech's TELRIC prices are contingent on what stage of the switch replacement process Ameritech is in. For example, when the cost of new switches decline over time – as one might expect -- Ameritech's TELRIC would

fail to fully reflect this trend in switch costs, because the proportions of new to additional lines would be fixed at level that is biased toward additional lines.

Dr. Ankum's methodology for calculating the TELRIC price when Ameritech purchases two types of lines at two different prices would create an erratic pattern in TELRIC prices over time. To adopt Dr. Ankum's model is to adopt the assumption that all switches will be replaced today and all lines purchased after this initial switch replacement will be purchased as growth lines in the TELRIC study. If Dr. Ankum has not correctly estimated the entire growth of access lines over the next 18 years (the life of the switch), he will have underestimated the proportion of additional lines, and under-stated TELRIC prices.

The problems associated with Ameritech's and Dr. Ankum's proposals are absent from Staff's approach. First, Staff's replacement/growth line ratio reflects the replacement/growth line ratio in Ameritech's network *over a long period of time*, and it lies between the two polar cases: Ameritech and Dr. Ankum's. Second, Staff's proposed approach to calculating the per-line TELRIC (when Ameritech purchases two types of lines at two prices) would correctly reflect any time trend in switching costs, because the costs are not skewed toward either extreme ratio. More specifically, when switch costs decline over time, the TELRIC prices generated by Staff's proposal are not manipulated by the stage of switch replacement process as the other models but reflect the long term ratio of replacement/growth lines.

For all the reasons stated above, the Proposed Order errs by adopting Ankum's typical switch model to calculate the TELRIC prices when Ameritech purchases two types of lines at two different prices. Staff asks that the Staff model be adopted.

B. The Proposed Order Incorrectly Finds That Ameritech's ULS Study Fails To Account For 14 Million Lines

Staff takes exception to a portion of the Commission Analysis and Conclusion in this section of the HEPO. The HEPO incorrectly concludes, on page 21, that the 'primary flaw in Ameritech's ULS study was its failure to account for some 14 million lines.' This conclusion is incorrect.

Ameritech did not fail to include or account for the 14 million lines in its TELRIC/ULS study. Contrary to the Proposed Order's conclusion (as well as Dr. Ankum's assertion), Ameritech included the 14 million existing access lines in its TELRIC/ULS analysis. This is accomplished by applying the singe price equivalent ("SPE") to *all access lines*, including the 14 million existing lines.

Ameritech, however, did not include the 14 million of existing access lines in the ARPSM when it calculated the SPE. The ARPSM itself is not (nor is it designed to be) a TELRIC study, and instead, it is designed and used (by Ameritech) to generate inputs for the subsequent TELRIC/ULS study. Specifically, Ameritech designed and used ARPSM to calculate the SPEs that Ameritech used as the would-be single prices that vendors would charge were they to use one-tiered (instead of two-tiered) pricing scheme. It is Ameritech's use of the SPEs in its TELRIC/ULS study, not excluding the 14 million lines from

ARPSM per se, that is the primary flaw of Ameritech's cost study, and excluding the 14 million lines from ARPSM is not equal to excluding the 14 million lines from the TELRIC/ULS study. The HEPO should instead find Ameritech's single price equivalent methodology as the primary flaw in Ameritech's cost study in this proceeding.

C. The Proposed Order Improperly Finds That Approximately 70% Of The 14 Million Access Lines Are Replacement Lines

Staff takes exception to a portion of the Commission Analysis and Conclusion in this section of the HEPO. The HEPO incorrectly concludes, on page 21, that approximately 70% of the (existing) access lines were replacement lines:

> The Commission has reviewed the evidence and argument and agrees in large part with AT&T/WorldCom witness Dr. Ankum that Ameritech's ULS and ST studies suffer from numerous flaws that resulted in inflated rates. The primary flaw in Ameritech's ULS study was its failure to account for some 14 million lines that its switches serve and the fact that approximately 70% of ***those lines*** were replacement lines.
> Proposed Order at 21 (emphasis added)

This conclusion is incorrect regardless whether "*those lines*" refers to the existing 14 million lines in Ameritech's network or it refers to the lines used by Dr. Ankum to generate his replacement/growth line ratio for two reasons.

First, if "***those lines***" refer to the 14 million lines that Ameritech currently services, the Proposed Order's conclusion is incorrect: the replacement/growth line ratio in Ameritech's existing network (14 million lines) is not 70%. The true long run line ratio is approximately the 61-39% ratio proposed by Staff.

Second, if "*those lines*" refers to lines used by Dr. Ankum to generate the approximate 70-30% ratio (Dr. Ankum's actual proposal is 73-27%), the Proposed Order's conclusion is still incorrect. In Dr. Ankum's model, the replacement lines are not 70% of total lines and growth lines are not 30% of total lines. This can be clearly seen from the line counts assumed in Dr. Ankum's model. ATT/WorldCom Ex. 1.0, Schedule AHA-2,[2] 5th Sheet, appended hereto as Attachment 1 to this Brief on Exceptions. Dr. Ankum's calculation uses a net present value (NPV) on the number of lines. Net present value methodology is only appropriate to discount future revenues; it is not appropriate to discount future lines. The use of the net present value causes an understatement in the number growth lines. This undercounting of lines can be seen by comparing the "Annual Growth Lines" column with the "NPV Line Growth" column on the 5th Sheet of Schedule AHA-2.

Dr. Ankum further skews the replacement/growth ratio by using a low projected growth rate over in the years outside the contract. The growth rates for the contract years range from 3.34% to 3.74% while Dr. Ankum chose a 3.24% growth rate for years 7 through 18 of the switches life. Instead of estimating growth lines into the future, Staff observed the ratio of replacement lines to growth lines over the long run. Staff's estimate is not skewed by risky predictions of the future line growth rates, it is instead informed by the reality of the current network.

[2] The sheet or page that is marked as "THIS PAGE CALCUALTES THE RELATI VE PERCENTAGE OF CUTOVER TO GROWTH LINES BASED ON AMERITECH PROVIDED GROWTH RATES."

All in all, neither the 70-30% nor the 73-27% ratio describes the replacement/growth line ratio in Ameritech's network, or in Dr. Ankum's model or assumed network. The correct ratio is the 61-39% ratio proposed by Staff. This ratio correctly reflects the replacement/growth ratio of Ameritech's network.

Proposed Replacement Provisions

Consistent with these arguments, the Staff recommends that the Proposed Order be amended as follows:

5. Commission Analysis and Conclusion on ULS Rate

The Commission has reviewed the evidence and arguments and agrees in large part with Staff witness Dr. Liu ~~AT&T/WorldCom witness Dr. Ankum~~ that Ameritech's ULS and ST studies suffer from numerous flaws that result in inflated rates. The primary flaw in Ameritech's TELRIC/ULS study ~~was its failure to account for some 14 million lines that its switches serve and the fact that approximately 70% of those lines were replacement lines~~ ~~in~~ is its assumption that the SPE (single price equivalent) is the price that the vendor would charge were it to charge a single price. In this respect, we note that Ameritech's contention that it is specifically limited in the number of replacement lines it can purchase is ~~directly contradicted by the fact that~~ supported by the terms of the switch contracts adduced into evidence, contrary to the CLECs' assertions. ~~indicate that there are a minimum number of replacement lines that Ameritech must purchase, but there is no limit on the number it can purchase~~. We further observe that the Staff's criticisms of the model on a purely economic basis are sound, and render it unnecessary for us to address the issue. Moreover, we find, as the Staff suggests we should, that the ARPSM model does not, in fact, produce an appropriate input for the TELRIC analysis. Further, we reject Ameritech's contention that only the lines contemplated by the PIP contracts are germane to our determination. If the purpose of TELRIC studies were to simply establish the future cost of installing lines of switching under the PIP contracts, those contracts would seemingly be the only matter on interest. TELRIC pricing does more, however, in that it also sets prices that will attach to the entirety of Ameritech's switching architecture, not just those lines installed pursuant to the PIP contracts. ~~It is for that reason that, as the CLECs noted, the "T" in TELRIC contemplates cost recovery across the total demand for a given service, in this case all access lines in Ameritech's~~

~~service territory~~. We ~~we~~ agree with Dr. ~~Ankum~~ Liu that the proper weighting is ~~30~~ 39% growth lines and ~~70~~ 61% replacement lines. This conclusion is consistent with the weighting of growth and replacement lines in the ULS study that Ameritech conducted in Michigan and we find it reasonable and based on the record evidence. The conclusion also obtains in the area of the Revenue Ready charges and trunk port investments that should be recovered based upon the same weighted averages.

Exception No. 2 The Proposed Order Improperly Declines To Adjust Ameritech's Joint And Common Cost Allocation

The Proposed Order finds, with respect to shared and common costs, as follows:

> The Commission declines Staff's invitation to consider joint and common costs in this docket. When commencing this proceeding, the Commission's intention was to resolve the issues surrounding shared transport, not to instigate a comprehensive TELRIC pricing docket. The absolute lack of substantive CLEC testimony on joint and common costs supports Ameritech' argument regarding the limited nature of this proceeding. While Staff notes the interrelationship between the individual TELRIC costs for each UNE and joint and common costs, it would have us consider only one portion of the fraction that is used to establish the joint and common cost markup.
>
> Further, the Commission recognizes that there is a valid joint and common cost markup in Illinois. Based on the record developed in the TELRIC Compliance proceeding (Docket No. 98-0396), the Commission has no cause to believe that Ameritech has not complied with the TELRIC Order in developing its markup for joint and common costs.
>
> Proposed Order at 27.

This finding is defective for several reasons. First, the joint and common cost markup in use in Illinois is by now quite obsolete; it is based on an extended TELRIC calculation and shared and common cost pools established in Docket No. 96-0486. Staff Ex. 2 at 2, *citing* Ameritech Ex. 2.0 at 10. It therefore follows

that the shared and common cost allocator does not include reductions in shared and common costs attributable to the SBC / Ameritech merger, *see generally* Staff Ex. 2.0, 6.0, and also does not include reductions in costs associated with technological advances certainly realized in what is universally accepted to be a technologically dynamic, declining cost industry. Further, an updated study of Ameritech's costs exists, Staff Ex. 2.0 at 3, although it has yet to obtain Commission approval. Id. Finally, the resolution of issues surrounding shared transport is one that clearly includes setting a rate for ULS-ST, which can only be done by using a reasonable – rather than a grossly obsolescent – shared and common cost markup.

Ameritech's allocator for shared and common costs should be addressed in this proceeding. It is clearly advisable to use the most current available information when establishing rates. Staff Ex. 2.0 at 4. The fact is that Ameritech's use of an allocator that is over four years old, *see* Second Interim Order, Docket No. 96-0486/0569 (February 17, 1998), results in increased rates for the ULS-ST offerings at issue in this proceeding. This is particularly inexcusable in light of the fact that, as noted above, newer cost studies exist[3]. Further, the Michigan and Indiana public utility commissions both determined that Ameritech's shared and common cost allocator in those states should be far lower than that sought by Ameritech here, and the allocator is currently being investigated in Wisconsin. Staff Ex. 6.0P at 4. The shared and common cost

[3] This is not to suggest that the Staff reposes a great deal of confidence in the 1998 Ameritech cost studies which, among other things, recognizes no merger savings whatever. Staff Ex. 6.0P at 6. This, however, merely demonstrates how improper it would be to use a study two years older, which was accepted prior to the merger even being announced.

allocators in other Ameritech states are particularly relevant in light of the fact that many common costs are allocated among the Ameritech regional companies. Id. Accordingly, the shared and common cost allocators used in other Ameritech states are a reliable proxy for Illinois.

In addition, the Commission determined in its *Access Charge Reform Order*, Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company; et al., Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of Incumbent Local Exchange Carriers in Illinois; Illinois Commerce Commission On Its Own Motion, Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future; Illinois Commerce Commission On Its Own Motion, Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company, ICC Docket Nos. 97-0601; 97-0602; 97-0516 (Consolidated) (March 29, 2000), determined that a proper shared and common cost allocation for switched services was 28.86%, Access Charge Reform Order at 51, a proposition with which Ameritech then concurred. Id. Accordingly, any allocation greater than that should be rejected. The Proposed Order, however, does not do so, and accordingly cannot be adopted.

There are, without question, difficulties associated with implementing adjustments to the shared and common cost allocator in this docket, although the Staff noted that they are not of its making, the Staff having urged Ameritech to provide cost materials in rebuttal testimony. Staff EX. 2.0 at 3. Ameritech

declined to present such materials. Staff Ex. 6.0 at 6, 12. Accordingly, adoption, on an interim basis, of the allocator approved by the Commission in the *Access Charge Reform Order* is proper. *See* Staff Ex. 6.0 at 3 (appropriate factor based solely on that Order is less than 29%). This will suffice until the Commission can determine the proper allocator, as the Staff submits should have been done in this proceeding. The Commission's authority is not circumscribed by the fact that Ameritech elected not to present evidence on the issue of shared and common costs in this proceeding.

Proposed Replacement Provisions

Consistent with these arguments, the Staff recommends that the Proposed Order be amended as follows:

A. Staff's Position

Staff argues that the shared and common cost factor used by Ameritech is unreasonably high. Staff disagrees with Ameritech's contention that it uses a shared and common cost factor that resulted from freezing the extended TELRIC calculation and shared and common cost pools established in Docket 96-0486/0569. In that proceeding, Staff contends that the Commission noted that, on average, Ameritech' shared and common cost factor was 29%. In Docket 96-0486/0569, the Commission also ordered other specific adjustments that reduced Ameritech' shared and common costs. Absent any Ameritech support of its joint and common cost factor other than the Order in Docket Nos.96-0486/0569, Staff claims that it is unreasonably high and that an appropriate factor based solely on that Order is less than 29%.

...

D. Commission Analysis and Conclusion

~~The Commission declines Staff's invitation to consider joint and common costs in this docket.~~ When commencing this proceeding, the Commission's intention was to resolve the issues surrounding shared transport, not to instigate a comprehensive TELRIC pricing docket. ~~The~~

~~absolute lack of substantive CLEC testimony on joint and common costs supports Ameritech' argument regarding the limited nature of this proceeding.~~ ~~While Staff notes the interrelationship between the individual TELRIC costs for each UNE and joint and common costs, it would have us consider only one portion of the fraction that is used to establish the joint and common cost markup.~~ One such issue is clearly the allocation for shared and common costs.

Further, the Commission recognizes that there is a valid joint and common cost markup in Illinois. Based on the record developed in ICC Docket 97-0601/0602 the Commission established a cap on Shared and Common Costs associated with switched services of 28.86% for both Ameritech and GTE. Ameritech agreed that the allocation of its shared and common costs, which produced the cap, was reasonable. Order, ICC Docket 97-0601-0602, at. 51. Therefore, the Commission adopts a shared and common cost factor of 28.86% for use in this docket. ~~the TELRIC Compliance proceeding (Docket No. 98-0396), the Commission has no cause to believe that Ameritech has not complied with the TELRIC Order in developing its markup for joint and common costs.~~

Exception No. 3 The Proposed Order Improperly Accepts Ameritech's Service Logic Development Costs

The Proposed Order finds that:

Staff's criticism of Ameritech' subject matter expert who provided the estimates for the service logic development cost are not well taken. The SME has over 20 years' experience with Ameritech, the past seven of which have been spent in her current capacity relating to AIN services. Staff offers no support for its assertion that cost estimates are routinely off by 10%, and, even if true, the cost estimate could just as easily be increased by 10%. Ameritech's developments costs are, therefore, accepted.

Proposed Order at 23.

This finding should be rejected. While the experience of a subject matter expert is certainly a matter to be given a certain amount of weight, the fact remains that SMEs work for an employer – in this case one that has every incentive to impose higher costs upon its competitors.

The $100,000 development costs of AIN Service Logic for ULS-ST and the eighty percent attributable to the OS/DA function were estimated by Carol Gruchala, the Associate Director – Project Design – AIN for SBC. (Staff Ex. 8.0, Attachment 2). In an e-mail correspondence to OS/DA costing effort made by another employee, Ms. Gruchala stated that actual cost was not tracked and the budgeted amount should be close enough. In addition, she "thought" 80% was attributable to the OS/DA function. Staff Ex. 8.0, Attachment 1. However, Ms. Gruchala mentioned that she had completed a certain program in the AIN project under budget saving Ameritech $87K. Based on the email reports provided, Staff determined that the costs included for this service were highly suspect, and therefore recommended additional reductions to the costs. IN fact, as seen, these reductions were less than those supported by internal documents

Proposed Replacement Provisions

Consistent with the above, Staff recommends that the proposed order be amended as shown:

COMMISSION ANALYSIS AND CONCLUSION

~~Staff's criticism of Ameritech' subject matter expert who provided the estimates for the service logic development cost are not well taken. The SME has over 20 years' experience with Ameritech, the past seven of which have been spent in her current capacity relating to AIN services. Staff offers no support for its assertion that cost estimates are routinely off by 10%, and, even if true, the cost estimate could just as easily be increased by 10%. Ameritech's developments costs are, therefore, accepted.~~

Staff has provided arguments in opposition to Ameritech's Service Logic Development Costs, the Commission does not find those arguments that the Commission considers compelling. While Ameritech's SME has over 20 years' experience with Ameritech, the past seven of which have

been spent in her current capacity relating to AIN services, company internal documents indicate that her estimates are suspect. Staff's proposed 10% appears reasonable in this light.

Exception No. 4 The Proposed Order Improperly Declines to Find that CLECs Should be Permitted to Use ULS-ST to Provide IntraLATA Toll Service and to Serve New and Additional Lines

The Proposed Order finds that:

> The initiating order commencing this investigation contemplated addressing tariff restrictions against CLECs using ULS-ST to provide intra-LATA toll calls or to provide new or second lines. Ameritech has now filed an interim tariff that allows both of these services to be provided via ULS-ST. In addition, the Commission is investigating identical terms and conditions as are contained in the interim tariff in Docket No. 01-0614. Accordingly, the terms and conditions relating to those services will be addressed in that docket and the matter is not ripe for determination here.

Ameritech has, indeed, filed an interim tariff that permits use of ULS-ST to provide intraLATA toll traffic, and to serve new and second lines. *See* Advice No. 7557 (September 18, 2001). This tariff has, however, been the subject of controversy itself, to the extent that it seeks to impose charges that had not previously been at issue in the TELRIC II proceeding, such as a non-recurring port connection charge of $53.01 to UNE-P orders. ILL. C.C. No. 20, Part 19, Section 21, cross-referencing ILL. C.C. No. 20, Part 19, Section 3, 1st Revised Sheets 37, 40[4]. Accordingly, CLECs are not appreciably better off. Thus, the Proposed Order must be reconsidered in this respect, especially in light of the

[4] The parties to Docket No. 98-0396 have attempted, with a fair degree of success, to reach agreement on an acceptable compliance tariff. It is the understanding of Staff that this point is one upon which the parties are in substantial agreement. To the extent that this agreement ultimately is incorporated into the compliance tariff, the Staff is prepared to withdraw this exception as to ULS-ST serving intraLATA toll.

fact that the Commission specifically directed an investigation of these issues in its Initiating Order. Initiating Order at 3 (November 1, 2000)

Proposed Replacement Provisions

The Staff proposes the following replacement provisions, beginning at page 27:

~~The initiating order commencing this investigation contemplated addressing tariff restrictions against CLECs using ULS-ST to provide intra-LATA toll calls or to provide new or second lines. Ameritech has now filed an interim tariff that allows both of these services to be provided via ULS-ST. In addition, the Commission is investigating identical terms and conditions as are contained in the interim tariff in Docket No. 01-0614. Accordingly, the terms and conditions relating to those services will be addressed in that docket and the matter is not ripe for determination here.~~

PROPOSED USE OF SHARED TRANSPORT FOR CLECS TO PROVIDE INTRALATA TOLL SERVICE

Ameritech Illinois' Position

Ameritech Illinois argues that federal law does not require that shared transport be made available for use by CLECs in providing intraLATA toll service, and thus any state-imposed requirement to that effect would preempted.

First, Ameritech Illinois states that in order for CLECs to use shared transport for intraLATA toll service, Ameritech Illinois would have to modify the routing tables in its local switches and thus provide the specific requesting CLEC with customized routing, and hence a customized version of shared transport. Specifically, with the "2-PIC" method currently used to allow end-users to presubscribe to the intraLATA toll carrier of their choice (which they can do because intraLATA toll service is competitive in Illinois and has been for several years), Ameritech Illinois' routing tables assign a different Carrier Identification Code, or "CIC," to each intraLATA toll provider. The unique CIC tells the switch which toll provider should receive the outgoing intraLATA toll call. The only way a CLEC could use shared transport for intraLATA toll service, Ameritech Illinois states, would be if the CLEC used the same CIC that Ameritech Illinois' uses for the calls of its intraLATA toll customers – that is, Ameritech Illinois would have to reconfigure the routing tables in its switches to allow other CLECs to share Ameritech Illinois' CIC. Because the FCC defined the shared transport UNE to include and require only the use of the incumbent LEC's existing routing tables, Ameritech Illinois

contends that the custom routing requested by the CLECs is not a required part of the shared transport UNE. And because the FCC has defined the UNE is that way, it necessarily has precluded any state commission from re-defining the UNE in a different manner.

Second, Ameritech Illinois asserts that the FCC has required shared transport to be unbundled for local use only and has never required that it be made available for intraLATA toll service. Ameritech Illinois supports this argument with multiple citations to the FCC's UNE Remand Order (CC Docket 96-98, rel. Nov. 5, 1999) and Third Reconsideration Order (CC Docket 96-98, rel. Aug. 19, 1997), which emphasize the alleged importance of unbundled shared transport for promoting competition in the local exchange market. Given that the FCC has drawn the line on the unbundling requirement for shared transport at local service, Ameritech Illinois argues that no state commission has authority to re-draw the line and require shared transport to be unbundled for use in providing different services.

Third, Ameritech Illinois states that the only conceivable way the shared transport unbundling requirement could be extended to intraLATA toll service would be if the FCC conducted a full "necessary and impair" analysis under Section 251(d)(2) of the 1996 Act and FCC Rule 317 (47 C.F.R. 51.317), but that the FCC has not done so. And even if a state commission could conduct its own "necessary and impair" analysis with regard to shared transport (although Ameritech Illinois argues that this is not permissible), Ameritech Illinois contends that the test could never be satisfied with respect to intraLATA toll service. Ameritech Illinois notes that intraLATA toll service has been declared competitive in Illinois for several years and is competitive today. In such circumstances, Ameritech Illinois states, unbundling requirements are not only ill-advised (as such requirements would undercut current competition by reducing the incentive of competitors to invest in their own facilities and innovate by themselves by making it extremely cheap to use UNEs instead of one's own facilities), but also illegal. Ameritech Illinois contends that under the 1996 Act and FCC's rules, unbundling requirements are intended to open the door to competition where little or none exists, not to give a special advantage to certain competitors in a market that is *already* competitive. The FCC has recognized that legally and factually discrete markets require discrete analyses when it comes to proposed unbundling requirements, and Ameritech Illinois argues that the CLECs have not even tried to satisfy the legal requirements for imposing a new unbundling requirement for intraLATA toll service, and could not meet those requirements even if they had tried.

In response to arguments by Staff and the CLECs, Ameritech Illinois first argues that using shared transport for intraLATA toll service is not a "functionality" of shared transport, as Staff and the CLECs claim.

This is because, as explained above, granting the CLECs' request would require custom routing and modification to Ameritech Illinois' existing routing tables, which by definition is not part of the shared transport UNE as defined by the FCC.

Ameritech Illinois also responds to Staff and the CLECs by explaining the FCC's Merger Order does not support the CLECs' request here. The FCC's order approving the SBC/Ameritech Merger (CC Docket 98-141, rel. Oct. 8, 1999) included a condition requiring Ameritech's operating LECs, within one year of the merger closing, to offer a version of shared transport on terms and conditions no less favorable than those offered by the SBC ILEC in Texas as of August 27, 1999. The CLECs argue that a November 4, 1999 order of the Texas Public Utility Commission required the SBC ILEC in Texas to allow CLECs to use shared transport for intraLATA toll service, and that this requirement falls within the merger order because it related to interconnection agreements that were in place prior to August 27, 1999. Ameritech Illinois disagrees, arguing that an order issued after August 27, 1999 cannot in any way change the terms and conditions that were actually offered in Texas as of August 27, 1999, and that on that date the SBC ILEC in Texas did not offer CLECs the use of shared transport for intraLATA toll service.

Staff and the CLECs also allege that it would be discriminatory if they cannot use Ameritech Illinois' CIC for their toll traffic, because unless that occurs their toll traffic will not be routed in the same manner as Ameritech Illinois' toll traffic. Ameritech Illinois states that such a claim is completely backwards, as CLEC customers' toll calls are today routed just like Ameritech Illinois' customers' toll calls, i.e., through a unique CIC and over a toll network rather than the local network, and that changing that status quo would create discrimination by treating each CLEC differently depending on whether they used shared transport.

Finally, while the CLECs and Staff rely on Section 13-801, recently added to the Illinois Public Utilities Act, to support their argument, Ameritech Illinois contends that (1) if Section 801 is read to require the provision of shared transport for intraLATA toll service, it is preempted by federal law and invalid; and (2) if the Commission can read Section 801 so as not to require the use of shared transport for intraLATA toll service, it must do so in order to save the statute from preemption.

Staff's Position

In this proceeding, Ameritech proposes tariff provisions that place substantial limitations upon the use of shared transport by CLECs. Specifically, it proposes limitations that would, if adopted, prevent CLECs from using shared transport to provide intraLATA toll service. Ameritech Ex. 1.0 at 16-17. Ameritech appears to argue that the ability to route

intraLATA toll calls is not included in the routing tables found in its switches, and is therefore not included within the FCC's definition of shared transport. Id. Ameritech asserts that the FCC's *Third Order on Reconsideration* supports this conclusion. Id. Likewise, Ameritech contends that it is not required by the *UNE Remand Order* to unbundle shared transport for this purpose. Id. Finally, Ameritech observes that CLECs wishing to route intraLATA toll service over Ameritech's facilities can purchase custom routing from it. Id.

None of these arguments should be considered. As an initial matter, it is well established that a CLEC purchasing a UNE, including shared transport, is entitled to the full features and functionalities of that UNE. Staff Ex. 1.0 at 17.To the extent that Ameritech seeks to limit a CLEC's use of a UNE, the Commission should carefully scrutinize the proposed limitation. In this case, the limitation does not withstand any level of scrutiny, since Ameritech is *denying* CLECs the full functionalities of the shared transport UNE. Staff Ex. 1.0 at 17; Joint CLEC Ex. 1.0 at 21-23.

Ameritech's assertion that the routing tables contained in its switches do not accommodate the routing of intraLATA toll service is controverted by the testimony of several witnesses to this proceeding. Joint CLEC witness Gillan notes that Ameritech's analysis of this issue does not appear to take into account the existence of CLECs; rather it characterizes them, for purposes of routing, as interexchange carriers. Joint CLEC Ex.. 1.0 at 21-22, *citing* Ameritech Ex. 1.0 at 15-16; *see also* CoreComm Ex. No. 1.0 at 4. Mr. Gillan observes that IXCs, and not CLECs, require custom routing; CLECs could simply retain the Carrier Identification Code ("CIC" Code) that Ameritech uses to route traffic that originates on its network. Joint CLEC Ex. 1.0 at 22-23; *see also* CoreComm Ex. 1.1 at 9.

In addition, by limiting the use of shared transport in the manner that it proposes, Ameritech violates the *Merger Order*. In that Order, the Commission directed Ameritech to deploy shared transport in Illinois under the same terms and conditions as SBC does in Texas. Merger Order at 257. In Texas, however, as the Commission in that state has directed, SBC provides shared transport of intraLATA traffic to CLECs without requiring them to resort to custom routing. Staff Ex. 1.0 at 18. In fact, the Texas Commission first required SBC to do so in November 1999, based upon interconnection terms SBC offered in May 1999 – four months *prior* to the Illinois Merger Order. Staff Ex. 5.0 at 10-11; Joint CLEC Ex 1.0 at 25. Accordingly, the Commission should not give credence to Ameritech's argument.

Ameritech's assertion that CLECs will not be impaired[5], within the meaning of the *UNE Remand Order*, by being compelled to purchase custom routing, is also markedly deficient. First, there is no reason here to conduct an unbundling analysis based upon the "impair" standard. There can be no legitimate dispute that ILECs are required by law to unbundle shared transport, or that CLECs purchasing shared transport are entitled to all of its features and functionalities. Routing of intraLATA toll traffic is merely a functionality of ULS-ST, and consequently no unbundling analysis is called for, the element in question having already been unbundled.

Second, if the Commission determines that an unbundling analysis is called for, such an analysis reveals that CLECs will certainly be impaired if Ameritech is not required to unbundle shared transport for CLEC intraLATA toll service. It is perfectly apparent that CLECs will incur additional – and, as has been seen, completely unnecessary – costs, if they are compelled to purchase custom routing for intraLATA toll calls. Staff Ex. 1.0 at 17; CoreComm Ex. 1.1 at 5-6; *see also* Joint CLEC Ex.1.0 at 20. Since, under the UNE Remand Order, whether a CLEC is impaired by the failure to unbundle an element is determined in significant part by whether the CLEC is required to incur material costs to obtain a substitute for the element, UNE Remand Order, ¶¶ 72, 74-83; the additional costs that CLECs must incur to obtain custom routing argue in favor of unbundling.

In addition, Ameritech's proposal would, if adopted, require CLEC intraLATA traffic to be routed in a manner different from Ameritech's. Staff Ex. 1.0 at 17. This could result in CLECs being unable to provide service of a quality comparable to Ameritech's. Staff Ex. 1.0 at 17; CoreComm Ex. 1.1 at 3-5. If the use of alternative elements compels a CLEC to provide service that is diminished in quality, this argues in favor of unbundling. UNE Remand Order, ¶96. Likewise, material operational or technical differences in functionality that arise from interconnecting alternative elements may also impair a CLEC's ability to provide service, which will, if found, support unbundling. UNE Remand Order, ¶99. It appears likely that Ameritech's proposal imposes a "material operational or technical difference" – as Ameritech appears to concede, when it proposes that CLECs can, as an alternative, purchase transport from other carriers. Ameritech Ex. 1.0 at 16-17. Whether or not Ameritech's proposal would result in diminished quality or material technical/operational differences, it is certainly discriminatory in the sense that it treats CLEC traffic – and CLEC customers – in a manner that is significantly different from, and apparently inferior to, Ameritech's. Id.

[5] Ameritech cannot, and does not, assert that the function of routing intraLATA toll traffic is proprietary, and thus the "necessary" standard need not be considered. UNE Remand Order, ¶31.

Finally, the Commission should consider the actions of sister-state Commissions with respect to this issue. As has been seen, the Texas Commission has directed SBC to provide shared transport of intraLATA toll traffic. In addition, the Michigan PSC has imposed the same requirement upon Ameritech in that state. CoreComm Ex. 1.1 at 6, 9. Moreover, SBC has committed to provide shared transport of intraLATA toll calls in Kansas and Oklahoma. Joint CLEC Ex. 1.1 at 19. In other words, in states where it has sought Section 271 certification, SBC has been willing – and able, without apparent difficulty – to solve this "problem." The Commission should, perhaps, give careful thought to Ameritech's unwillingness to provide shared transport for intraLATA toll service in Illinois.

CLECs' Position

The Joint CLECs contend that Ameritech proposes to unreasonably restrict the use of shared transport to "local" traffic only, requiring that any intraLATA "toll" traffic be routed to a different carrier's network for termination. Ameritech Ill. Ex. 1.0 (Hampton) at 15-18. This limitation, according to the Joint CLECs, denies entrants access to the full functionality of Ameritech's ULS and shared transport networks, in direct violation of both federal and state law. In claiming that it is entitled to deny CLECs the use of shared transport for terminating intraLATA toll traffic, Ameritech attempts to redefine CLECs as "IXCs" so that it may then claim that an IXC is seeking "custom routing of its toll" traffic. Ameritech Ill. Ex. 1.0, pp. 16.

But, Mr. Gillan testified that Ameritech has the relationships all backward. The purchaser of ULS-ST is a CLEC, not an IXC. As a CLEC, the ULS-ST purchaser is entitled to the option of using presubscription to route its customer's toll traffic to another network, but it does not have the obligation to carry this traffic to an IXC network, or even treat this traffic as "toll" in its retail offerings. Joint CLEC Ex.1.0 at 22.

Nor, Mr. Gillan testified, does the CLEC require custom routing to route intraLATA toll traffic over shared transport. A CLEC that desires to use the full functionality of shared transport – that is, to have all of its intraLATA traffic terminated over the existing network – would simply retain the Carrier Identification Code (CIC) that Ameritech uses to direct that these calls be terminated over Ameritech's shared transport network. There is no custom routing involved at all, Mr. Gillan explained, the call would continue to be routed just as it would if the customer was an Ameritech subscriber and had continued to use Ameritech for this "toll" traffic. Joint CLEC Ex. 1.0, p. 22.

Mr. Gillan noted that while a CLEC has the option of invoking presubscription -- and requesting that these calls be routed to a different network of its choice -- the CLEC is also entitled to maintain the default routing over the existing network to the terminating end-office. There is no requirement that such traffic must be routed to a network other than Ameritech's for termination; hence, there is no request here for "custom routing." The solution, Mr. Gillan contends, is simply to retain the routing instruction that directs this traffic over the shared transport network to its destination end-office, just as Ameritech would terminate the traffic over the shared transport network using the same routing instruction. Joint CLEC Ex.1.0 at 22-23.

Mr. Gillan testified that there is no question that the CLEC is entitled to use the full functionality of the local switch, including this default routing of intraLATA "toll" traffic as part of shared transport and at TELRIC-based shared transport rates. A CLEC purchasing ULS is fully entitled to all the features and functions of the local switch, including its routing tables and nondiscriminatory access to the shared transport network. Ameritech must provide entrants the ability to terminate their intraLATA minutes commingled with Ameritech's traffic (and at shared transport rates), for this is the very essence of shared transport. Joint CLEC Ex.1.0 at 23. *See Third Order on Reconsideration,* CC Docket No. 96-98, ¶ 2, August 18, 1997. There is no explicit or even silent limitation in the definition of shared transport that excludes calls that the incumbent has chosen to consider "toll." Joint CLEC Ex.1.0 at 23.

Moreover, Mr. Gillan pointed out that Ameritech also committed to offering shared transport in Illinois on terms that are no less favorable than the shared transport offered by SBC by Texas. *See* Merger Condition No. 28, Order dated September 23, 1999, ICC Docket No. 98-0555, p. 257. Mr. Gillan noted that the Texas Commission required that SWBT permit other carriers to use the same CIC code that SWBT uses to route intraLATA traffic using shared transport. AT&T/PACE/Z-Tel Joint Ex. JPG-01, Arbitration Award, *Complaints of Birch Telecom and Sage Telecom Against Southwestern Bell Telephone Company*, Before the Texas Public Utility Commission, Docket Nos. 20745 and 20755, ("Sage Decision"), November 4, 1999, pp. 10 and 13. Far from being a request for custom routing, Mr. Gillan emphasized that all that is being requested here is access to the standard routing mechanism.

Mr. Gillan testified that there is no dispute that SBC is required in Texas, under contracts that were in effect prior to the merger closing, to provide shared transport for the termination of all intraLATA traffic. Joint CLEC Ex. 1.0 at 26. Further, SBC has agreed to extend this same treatment to CLECs in Kansas and Oklahoma, recognizing that it is required to offer shared transport in this manner in Texas. *See* Joint CLEC Ex. at 26, citing

Memorandum Opinion and Order, CC Docket 00-217, January 19, 2001, paragraph 174. A plain reading of SBC/Ameritech's merger commitments requires that the same approach apply in Illinois.

Moreover, the Joint CLECs contend that even if Ameritech were not already required by the Telecommunications Act of 1996, the FCC's rules and the Commission's Orders in several cases, including the Commission's Merger Order in ICC Docket No. 98-0555, to provide CLECs with the option of using shared transport to route intraLATA toll traffic, the new Illinois legislation – passed after the evidentiary record in this proceeding was closed -- requires Ameritech to provide CLECs with unrestricted access to unbundled network elements, including shared transport, for the purpose of providing all new and existing telecommunications services within the LATA, including intraLATA toll. *See* Section 13-801 of the June 30, 2001 Amendment to the Illinois Public Utilities Act (House Bill 2900 or PA 92-22).

The Joint CLECs urge the Commission to require Ameritech to offer shared transport for all traffic, including intraLATA "toll" traffic, in the same manner as it offers shared transport in Texas. Again, the Commission should make very clear that when a CLEC uses shared transport to route intraLATA toll traffic, shared transport rates and not access rates shall apply. To make clear its authority, the Joint CLECs also urge the Commission to indicate that it is reaching this decision in accordance with the federal Telecommunications Act, the FCC's rules, the Illinois Commission's own Merger Order, the federal merger conditions, and the Commission's own authority under the Illinois Public Utilities Act. Joint CLEC Ex. 1.0 at 27. As Mr. Gillan explained, the success of local competition in Illinois rests in the hands of this Commission, and the Commission should rely as much as possible on its independent authority to achieve pro-competitive results.

Findings by the Federal Communications Commission

This Commission notes that the FCC recently addressed Ameritech and SBC's arguments regarding restrictions of CLEC's use of Shared Transport. In the FCC's Notice of Apparent Liability For Forfeiture (FCC 02-7, released January 18, 2002) the FCC states:

> 13. SBC also argues that it has not violated the merger conditions because (1) the *Texas Arbitration Award* imposed a new obligation that was not in place on August 27, 1999, and thus is not relevant to SBC's obligations under the merger conditions, and (2) SBC was not "offering" shared transport for intraLATA toll on August 27, 1999, because it allowed Birch and Sage to use shared transport on that date only because the PUC had temporarily

enjoined it from implementing the routing changes it proposed in April. We find no merit in either of these contentions. It is quite clear that the *Texas Arbitration Award* constitutes a review of SBC's obligations under its *existing* agreements, and not a policy decision to impose new requirements. The arbitrators set forth the issues in terms of what the interconnection agreements require, and engaged in an analysis of specific language from the agreements to determine what SBC's obligations were. Moreover, SBC seems to have understood contemporaneously that the Texas proceeding was interpreting an existing agreement, as it apparently made arguments about the proper interpretation of that agreement. Thus, although the *Texas Arbitration Award* was not issued until November 1999, it describes obligations that were in effect in August. Moreover, SBC's argument that the arbitrators' injunction demonstrates that it did not "offer" shared transport for routing intraLATA toll calls has no persuasive force in light of the Texas PUC's ultimate conclusion that SBC's agreements already obligated it to do so.

14. SBC also argues that the way in which CLECs have requested to route intraLATA traffic does not constitute "shared transport" within the meaning of paragraph 56 of the Merger Conditions. First, SBC asserts that:

> the facilities that SBC's ILECs use to complete intraLATA toll calls are distinct from the 'shared transport' that SBC is required to unbundle under the Commission's rules. Paragraph 56 of the Merger Conditions, which by its terms has to do with the terms and conditions on which Ameritech would offer the shared transport UNE, therefore has nothing whatsoever to do [with the issue under investigation].

We disagree. The Merger Conditions define "shared transport" as that term is defined in the Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460 (1997). That order defines shared transport as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, *between end office switches and tandem switches*, and between tandem switches, in the incumbent LEC's network." The intraLATA toll arrangements that CLECs in the Ameritech states have requested (and that the Texas Commission found to be required in Texas) consist of routing

between end office switches and tandem switches. Therefore, we reject SBC's contention that the facilities that would be used to route intraLATA traffic do not fit within the definition of shared transport.

15. In addition, SBC argues that the Merger Order's shared transport obligation is restricted to the use of shared transport for purely *local* service, and does not extend to intraLATA toll routing. We disagree with SBC's assertion that the definition of shared transport encompasses such a use restriction. The definition contained in the *Local Competition Third Order on Reconsideration* does not distinguish between purely local services and long distance services. Moreover, we note that when both the Merger Order and the *Local Competition Third Order on Reconsideration* were adopted, the Commission had in place a rule prohibiting use restrictions on UNEs. Thus, we are unpersuaded by SBC's attempt to read such a use restriction into its obligations under the merger conditions.

16. SBC's responses indicate that in all five of the Ameritech states, it has refused to offer shared transport for end-to-end routing of intraLATA toll calls, and indeed has affirmatively opposed requests for such service before the state commissions. It continued to do so even after the *Texas Arbitration Award* made undeniably clear its obligations in Texas. Thus, we find that SBC has apparently violated paragraph 56 of the merger conditions, in each of the Ameritech states.

17. In addition to arguing that it has complied with the merger conditions, SBC argues that the paragraph 56 condition is no longer applicable. In its more recent responses to the Bureau's inquiry letter, SBC argues that the requirement that it provide shared transport in the former Ameritech states on "terms and conditions … substantially similar to (or more favorable than) the most favorable terms SBC/Ameritech offer[ed] to telecommunications carriers in Texas as of August 27, 1999" was terminated by the Commission's *UNE Remand Order*. By its terms, paragraph 56 was "[s]ubject to state commission approval and the terms of any future Commission orders regarding the obligation to provide unbundled local switching and shared transport." SBC asserts that because the *UNE Remand Order* addressed the obligation of an incumbent LEC to make shared transport available to CLECs, any obligation to provide shared transport pursuant to paragraph 56 of the Merger Conditions terminated upon release of the *UNE Remand Order*. We disagree. The *UNE Remand Order* was adopted on September 15, 1999, three weeks *before* the

SBC/Ameritech Merger Order was adopted on October 6, 1999. Thus, the *UNE Remand Order* cannot plausibly be considered a "future Commission order" under paragraph 56 of the Merger Conditions. We reject the suggestion that the Commission would have imposed a merger condition that had already been superseded by other events that were obviously well-known to the Commission at the time the *SBC/Ameritech Merger Order* was adopted.

18. Even if it were a "future Commission order," nothing in the UNE Remand Order appears to supersede the requirements imposed by paragraph 56. Here, again, SBC argues that the obligation to provide shared transport extends only to the use of that UNE in connection with purely local service, not intraLATA toll. As noted above, however, the definition of shared transport in the UNE Remand Order (*i.e.*, the *Local Competition Third Order on Reconsideration*) contains no such express restriction, and the Commission's rules generally prohibit ILECs from imposing use restrictions on UNEs. Moreover, we note that in a decision that post-dates the UNE Remand Order, the Commission treated an allegation that SBC had unlawfully precluded competitors from using UNEs to provide intraLATA toll service as a section 271 checklist compliance issue. Thus, by implication, the Commission treated the matter as an issue of compliance with the Commission's UNE unbundling rules.

19. Finally, SBC argues that the Bureau (and presumably, the Commission) lacks authority to adjudicate this matter based on the merger conditions. SBC notes that paragraph 56 states that its requirements are "subject to state commission approval." Thus, SBC asserts that enforcement of that paragraph "requires resort to state commission arbitration procedures." We find SBC's interpretation to be unsupported by the *SBC/Ameritech Merger Order*, and reject SBC's attempt to persuade us not to enforce our own order. The cited clause merely refers to the requirement that the interconnection agreements be approved by the state regulatory body. (In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, FCC 02-7, 17 FCC Rcd 1397 (2002), at paragraphs 13-19) (Footnotes omitted)

It is clear from these paragraphs that the FCC found Ameritech's refusal to allow CLECs to provide IntraLATA toll service with shared transport to violate: 1) the FCC's merger order, 2) the Third Report and Order, and 3) and the UNE Remand order. As the FCC's merger order is substantially similar to the ICC's merger order, the FCC's findings lead this Commission

to conclude that Ameritech has violated the ICC merger condition 28 found at page 250 of the order in Docket 98-0555.

Commission Analysis and Conclusion

We disagree with Ameritech that it is not obligated by our Merger Order in ICC Docket No. 98-0555 and the FCC's Merger Order FCC 99-279 to provide shared transport to CLECs for the routing of intraLATA toll traffic as Ameritech defines it. The clear language of our Merger Order requires Ameritech to provide shared transport in Illinois "under terms and conditions (other than rate structure and price) that are substantially similar to the most favorable terms offered by SBC to CLECs in Texas as of the Merger Closing Date." Ameritech's own witness admitted that SBC has been allowing CLECs to route intraLATA toll traffic over shared transport in Texas since at least April 1999, first pursuant to an interim order dated April 26, 1999 and then pursuant to a final order dated November 4, 1999. It is therefore undisputed that SBC was providing this functionality of shared transport – to which CLECs are clearly entitled under federal law and state law – as of the Merger Closing Date. Moreover, Section 13-801 of the Illinois Public Utilities Act expressly requires Ameritech to enable CLECs to use network elements for the provision of intraLATA toll traffic. Thus, we conclude that Ameritech is required to provide shared transport for intraLATA toll traffic, and at shared transport rates.

Ameritech's claim that the CLECs are requesting customized routing is similarly inaccurate. The CLECs are not requesting customized routing. Rather, they are requesting the use of the existing routing tables of the switch matrix that Ameritech uses to route the intraLATA toll traffic of its own end users. Ameritech is required to provide nondiscriminatory access to unbundled network elements, including shared transport, and to allow Ameritech to use shared transport for intraLATA toll traffic but not to allow CLECs to do the same would violate its obligation not to discriminate.

We agree with the CLECs that the "impair" test is inapplicable here. First, shared transport is an unbundled network element, or UNE. As such, the "impair" test, which only applies as a matter of federal law to new UNEs, does not apply here. In addition, the Illinois Public Utilities Act does not contain a "necessary and impair" standard. Even if it did, we are confident that the standard would be satisfied. We are not alone in this conclusion. Indeed, SBC/Ameritech is already obligated to provide this functionality in Texas, Michigan, Kansas and Oklahoma. For this reason, we also conclude that Ameritech's argument that its billing systems cannot determine who should pay the terminating access charges is wholly unfounded.

Requirement that Ameritech Provide ULST-ST CLECs Wishing to Use it to Serve New and Additional Lines

Ameritech Illinois' Position

Ameritech Illinois argues that federal law prohibits and preempts any requirement that it combine UNEs for CLECs. It bases this position largely on the decisions of the United States Court of Appeals for the Eighth Circuit in Iowa Utils. Bd. v. FCC, 219 F.3d 744, 758-59 (8th Cir. 2000) ("IUB III") and Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997) ("IUB I"). The Supreme Court has granted certiorari on the UNE combinations issue in IUB III (even though the CLECs did not challenge the Eighth Circuit's very same holding when certiorari was granted from IUB I).

Although it acknowledges that the issue is currently pending before the Supreme Court, which will have the last word, Ameritech Illinois argues that the Eighth Circuit's decision in IUB III is currently the controlling federal law and prohibits any state-imposed requirement that ILECs combine UNEs for CLECs. In IUB III the Eighth Circuit was proceeding under the Hobbs Act, 28 U.S.C. 2341(1), under which it was the sole appellate court in the nation with authority to review the FCC's unbundling rules. In reviewing those rules, the court held that FCC Rules 315(c)-(f), which had required ILECs to combine UNEs for CLECs, violated the plain language of their 1996 Act and therefore were invalid. IUB III, 219 F.3d at 758-59. While the Supreme Court can review that decision, no other court in the nation can even entertain a challenge to it, as collateral attacks on decisions of Hobbs Act courts are forbidden. E.g., FCC v. ITT World Comms., Inc., 466 U.S. 463, 468 (1984). Thus, for example, the Seventh Circuit court of appeals could not hold that the 1996 Act authorizes the FCC to impose a UNE-combining requirement on ILECs, and neither could any other court (or agency) in the country aside from the U.S. Supreme Court.

The CLECs argue that the Eighth Circuit's holding binds the FCC but its interpretation of the Act applies only in the states covered by the Eighth Circuit. Ameritech Illinois argues that such a theory makes absolutely no sense in light of the structure of the 1996 Act. The 1996 Act establishes the FCC as the primary interpreter of the 1996 Act and creator of regulations under the 1996 Act. The FCC's interpretations are given deference by the courts that, as a matter of law, is not give to state interpretations of the 1996 Act. As a matter of law and logic, then, if the 1996 Act draws a line beyond which the FCC cannot go, no state commission can cross that line, either. State commissions act as "deputized" federal regulators under the 1996 Act, but if the Act prohibits the sheriff (i.e., the FCC) from doing something, then is necessarily also prohibits the deputy (i.e., state commissions).

The CLECs also argue that the Commission can impose a UNE-combining requirement on Ameritech Illinois under state law alone,

including new Section 13-801 of the Illinois PUA. Ameritech Illinois responds that where the 1996 Act has addressed an area, such as who must combine UNEs, it is supreme and states cannot impose requirements that conflict with the 1996 Act. Ameritech Illinois explains that, as the Supreme Court has held, with respect to matters addressed by the 1996 Act, the federal government has "unquestionably" taken telecommunications regulation away from the states. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999) ("IUB II"). As the Eighth Circuit held, one of the "matters addressed by the Act" is who can be required to combine UNEs, and the answer, unless and until the Supreme Court holds otherwise, is "not the ILECs." IUB III, 219 F.3d at 758-59. Ameritech Illinois therefore argues that any state-imposed requirement that an ILEC combine UNEs for CLECs is preempted under IUB III, including any requirement imposed under new Section 801.

Staff's Position

As an initial matter, it is important to note that Ameritech's "restriction" upon the ordering of ULS-ST by a CLEC which intends to use it to provision service to a new or additional line is not a "restriction" at all; it is in fact a blanket refusal to accept such orders or provision such service. Ameritech contends that the federal courts have vacated FCC rules requiring it to combine elements it does not currently combine in its network. See Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000); cert.granted, -- US --; 121 S. Ct. 878; 148 L. Ed. 2d 788 (2001) (vacates 47 CFR 51.315(c)-(f)). Accordingly, Ameritech argues, it has no obligation to combine elements that are not currently combined, even if they are "ordinarily combined" in its network. See 47 CFR 51.315(c). Since provisioning of new and additional lines, by definition, requires Ameritech to combine elements not currently combined, Ameritech argues that it is not required by law to offer UNE-P or ULS-ST -- both of which are combinations of elements -- to CLECs wishing to serve customers requesting new service or additional lines. See, e.g., Ameritech Ex. 3.1 at 2, et seq. Instead, Ameritech asserts that it is only required to provide them in a manner that permits a requesting CLEC to combine the elements itself. Ameritech Ex. 3.1 at 3. In practice, this means that a CLEC wishing to provide service using UNEs to a new customer or a customer requesting a second line will be compelled to purchase collocation space, contract with vendors for tie cables, use more cross-connections than Ameritech's own configuration, and install cross-connections to its own distribution frame. Staff Ex. 1.0 at 21.

Ameritech advances no policy or economic arguments in support of its position. In fact, Ameritech's only argument is that federal law does not require it to combine elements that are not currently combined for CLECs. See, generally, Ameritech Ex. 3.1.

This argument is, however, defective for a number of reasons. First, the Illinois General Assembly has spoken to this issue. Section 13-801(d)(3) of the Public Utilities Act, enacted June 28, 2001, provides in relevant part, that:

> Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for it if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

220 ILCS 5/13-801(d)(3) (emphasis added).

Ameritech cannot, therefore, argue that the Eight Circuit's action in vacating 47 CFR 51.315(c) aids its cause[6]. It must combine for requesting CLECs any sequence of elements it ordinarily combines for itself as a matter of state law. Nor is Ameritech's obligation limited to those elements identified in Ameritech Ex. 3.1, Schedule SJA-4; the statute clearly requires the company to combine all elements "ordinarily combined" in its network, including – but not limited to – those elements. 220 ILCS 5/13-801(d)(3).

Likewise, Ameritech cannot argue – at least in good faith – that it does not "ordinarily combine" all of the elements used to provide POTS service to new and second lines. Accordingly, state law – on its face – requires Ameritech to combine elements for CLECs.

Ameritech perhaps believes that Section 13-801(d)(3) is preempted by federal law, and may attempt to pursue that argument in this proceeding. However, while Ameritech can make any federal preemption argument it cares to make regarding its obligation to combine elements it ordinarily combines, the passage of PA 92-22 by the General Assembly prevents it from making such arguments before the Commission. As

[6] It should be noted that the validity of Rule 315(c) is one of the issues upon which the Supreme Court granted *certiorari*, and will hear. Iowa Utilities Board v. FCC, -- US --; 121 S. Ct. 878; 148 L. Ed. 2d 788 (2001).

Ameritech will doubtless agree – having often argued as much – the Commission is a creature of state law, and bound by the acts of the General Assembly. The General Assembly has spoken to the issue of UNE combinations, and the Commission must adhere to this pronouncement.

Of course, to the extent that Ameritech believes that the General Assembly has acted in a manner that is preempted by federal law, it has a remedy available to it. Specifically, Ameritech may petition the FCC under Section 253(d) of the Telecommunications Act of 1996, to preempt Section 13-801(d)(3), on the grounds that it violates, or is inconsistent with, the federal Act. 47 USC 253(d).

However, Ameritech cannot hope to successfully raise a preemption argument here. The Illinois Commerce Commission has no authority to declare an Act of the Illinois General Assembly preempted. Accordingly, the Commission must reject Ameritech's argument that federal law does not require it to combine UNEs for CLECs.

In addition to being unlawful, Ameritech's position is extremely poor public policy, economically unsound, and profoundly detrimental to competition. It is clear that a substantial portion of potential CLEC customers consists of persons or businesses seeking new service, relocation of existing service, or second lines. Staff Ex. 1.0 at 20, 24; see also AT&T/PACE Ex. 1.0 at 31. While it is easy to discern Ameritech's motives in trying to make certain CLECs to have a chance to compete in this substantial market, such an impediment to competition is not what the Congress intended in enacting the Telecommunications Act of 1996, or what the General Assembly intended in enacting PA 92-22. Both statutes clearly articulate a policy of fostering competition. See, e.g., 47 USC et. seq; 220 ILCS 5/13-101, 13-102 (statements of legislative intent that competition be fostered).

To be sure, Ameritech's refusal to provide UNE-P to CLECs for serving new customers or second lines does not absolutely prevent CLECs from serving such customers. However, it does effectively prevent CLECs from using UNEs to serve such customers, by needlessly imposing substantial costs upon the provisioning of UNEs. AT&T/PACE Ex. 1.0 at 35-36. For example, collocation at every Ameritech Illinois central office would cost a CLEC over $8 million[7]. Staff Ex. 1.0 at 22. In addition, a CLEC would have to provision tie-cables and its own frame, as well as terminations on the frame. Staff Ex. 1.0 at 22. On top of all this, the CLEC would pay for two cross-connection jumpers on the MDF. Id. Moreover, Ameritech would likely profit by carrying out much of this work.

[7] This assumes that collocation space is available; space is not available in 21 Ameritech central offices. WorldCom Ex. 1.1 at 9.

AT&T/PACE Ex. No. 1.0 at 35. In addition, provisioning service in this manner would increase the likelihood of failure and decrease service quality. Staff Ex. 1.0 at 23; AT&T/PACE Ex. No. 1.0 at 35; WorldCom Ex. 1.0 at 9.

It is clearly ludicrous to require CLECs to take all of these steps. In effect, CLECs are being asked to incur a series of substantial, and completely unnecessary costs, which they must pay to their chief competitor, to provide customers with inferior service in an absurdly complicated manner. This makes no economic or practical sense. Indeed, Ameritech's proposal is even detrimental to certain of its own interests. The company has complained in prior dockets that it is faced with exhaustion of space on its main distribution frames; its proposal here would exacerbate that problem. Staff Ex. 1.0 at 23.

Other Commissions in Ameritech states recognize the absurdity of this requirement. The Wisconsin, Indiana and Michigan commissions all require Ameritech to provide CLECs with UNE-P to serve new and additional lines. WorldCom Ex. 1.0 at 6. Indeed, SBC recognizes that UNE-P is the most effective way to serve new and additional lines. Its competitive affiliate, SBC Telecom, uses UNE-P to serve new and additional lines in New York, Pennsylvania and Georgia. Staff Ex. 1.0 at 20; 5.0 at 8; WorldCom Ex. 1.0 at 7. This demonstrates the poverty – not to mention the insincerity – of Ameritech's position.

The Joint CLECs' Position

A. Pro-Competitive Public Policy Requires Ameritech To Provide New Combinations of Network Elements

The Joint CLECs contend that the issue of "new combinations" has already been fully litigated in ICC Docket No. 98-0396. That docket has been fully briefed and is awaiting a Commission order. The Proposed Order in that docket – issued on June 7, 2001 and based on an evidentiary record that preceded the date of the new Illinois legislation known as House Bill 2900 or PA 92-22 – correctly concludes that Ameritech is required to provide combinations of unbundled network elements ordinarily combined in its network, including providing the UNE-Platform to CLECs for the purpose of serving new lines and additional, or second, lines to their customers, as a matter of both federal law and state law. Proposed Order dated June 7, 2001, ICC Docket No. 98-0396, p. 93.

The Joint CLECs emphasize that it is critical to understand just how important this issue is in its effect on local competition. The simple

answer, Mr. Gillan explained, is that consumers and businesses frequently add lines and change locations. If this process is made complex and expensive, then Ameritech will successfully disadvantage its rivals by increasing the cost of competitive alternatives. Consider the following statistics. According to the US Census, nearly 16% of the population moved in 1998. AT&T/PACE/Z-Tel Joint Ex. 1.0, p. 33. In addition, businesses are constantly adding and deleting locations. Data for Illinois suggests that nearly 21% of all business locations open or close in a year. Id. at 33-34. Any strategy that artificially inflates the cost to serve such a mobile population will harm both competition and consumers. As the Proposed Order in ICC Docket No. 98-0396 correctly finds, requiring Ameritech to provide combinations of network elements ordinarily combined in its network is necessary "to promote mass market competition for residential and small business customers in Illinois."

While the Proposed Order in ICC Docket No. 98-0396 finds that Ameritech is required to provide new combinations as a matter of both federal law and state law as it existed back on June 7, 2001, the Joint CLECs note that the new Illinois legislation also requires that Ameritech "combine any sequence of unbundled network elements that it ordinarily combines for itself" for the CLECs' use in providing telecommunications services in Illinois. See Section 13-801(d)(3) of the June 20, 2001 Amendment to the Illinois Public Utilities Act, House Bill 2900 or PA 92-22. Thus, in the highly unlikely event the Commission has not already ordered Ameritech to provide "new combinations" in ICC Docket No. 98-0396 at the time the Commission issues an order in this proceeding, the Commission should require Ameritech – both as a matter of federal law and the Commission's own independent state law authority – to combine for CLECs any requested network elements that it ordinarily combines for itself, including, but not limited to, the UNE-Platform for the purpose of serving new and additional, or second, lines. To that end, the Joint CLECs urge the Commission to adopt the tariff proposed by MCI WorldCom witness Ms. Lichtenberg requiring Ameritech to provide the UNE-Platform for new and second lines. WorldCom Ex. 1.1 (Lichtenberg Rebuttal), Schedule SL-4.

B. Legal Analysis

1. The Iowa Utilities Board Line of Cases Does Not Preclude This Commission From Requiring Ameritech To Provide UNE Combinations Under Either State Or Federal Law.

The Joint CLECs maintain that this Commission has the clear authority to require Ameritech to combine UNEs for CLECs. Ameritech Illinois' position on providing UNE combinations is that the federal Act, as interpreted by the Eighth Circuit in Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997) (subsequent history omitted) ("IUB I") and Iowa Utils. Bd. v. FCC, 219 F.3d 744, 758-59 (8th Cir., July 18, 2000)("IUBIII") and the FCC's UNE Remand Order cannot be read to require Ameritech Illinois to provide UNEs that are "ordinarily combined" or, for that matter, any UNE combinations where specific facilities are not already combined in its network. Joint CLEC Reply Brief, p. 13.

Certainly, the Joint CLECS note, the recent IUB III decision relied upon so heavily by Ameritech Illinois has not changed its obligation to offer UNE combinations. IUB III simply has no limiting effect on the Commission's previous orders and the new Illinois legislation, House Bill 2900, requiring Ameritech Illinois to offer UNE combinations and the UNE Platform without restriction. Moreover, it has no effect on this Commission's ability to do so once again in this case. The effect of the Eighth Circuit's decision can be stated simply. It vacated rules of the FCC that, while in effect, bound state commissions and constrained their decisions regarding UNE combinations and pricing. Id.

Notwithstanding IUB III, the Joint CLECs emphasize that state commissions such as this one remain free to act based on their own interpretations of the Act, and to exceed the scope of current FCC regulations on UNE combinations to the extent federal law does not already require ILECs to combine network elements for CLECs. The Eighth Circuit's interpretation of the Act (as distinguished from the FCC's regulations pursuant to the Act) will control only within the Eighth Circuit. The JOINT CLECs argue that nothing in the Hobbs Act or any other statute or legal principle elevates a regional court of appeals to the level of the Supreme Court for purposes of this case and forbids other authorities from reaching different conclusions about the meaning of the Act, just as they may do in any other case. Each state commission's decision will be subject to review in the appropriate federal district court and court of appeals. State commissions outside the Eighth Circuit are thus not bound by the IUB I and IUB III decisions, and their decisions will be upheld if an appropriate Court of Appeals disagrees with the Eighth Circuit's rulings. Joint CLEC Reply Brief, p. 13.

Moreover, the Joint CLECS point out that to the extent Ameritech Illinois bases its claim that it has no obligation to combine elements in a nondiscriminatory fashion on the rationale of the Eighth Circuit with respect to FCC Rules § 315(c)-(f), its claim is based upon a fallacy. When

vacating these rules §315 (c)-(f) (in 1997), the Court of Appeal's decision was premised on the view that: (a) the ILECs would prefer to grant competitors access to combine network elements themselves, and (b) that the FCC's rules otherwise required the ILECs to perform unreasonable extra work. For instance, the Joint CLECs note that the court emphasized that "the Act does not require the incumbent LECs to do all the work." IUB I, at 813 (emphasis in original). The latter assumption is invalid by definition with respect to elements that are "ordinarily combined." Joint CLEC Reply Brief, pp. 13-14.

It is for these reasons, the Joint CLECs note, that courts outside of the Eighth Circuit have recognized their obligation to apply what they believe to be the correct interpretations of the Act, even when the Eighth Circuit has expressed a contrary view. For example, the Ninth Circuit upheld an interconnection agreement requiring US WEST to provide combinations of network elements despite the fact that the Eighth Circuit had struck down the FCC's rules upon which the state commission had relied in imposing the requirements. MCI Telecommunications Corp. v. US WEST Communications, 204 F.3d 1262, 1268 (9th Cir. 2000), cert. denied, 121 S.Ct. 504 (Nov. 13, 2000). Finding the Eighth Circuit's interpretation of the Act unpersuasive, the Ninth Circuit ruled that the state commission could mandate combinations under the Act. Id. And US WEST's petition for certiorari, which erroneously claimed that the Ninth Circuit's decision was inconsistent with the Hobbs Act, was then denied by the Supreme Court. See US WEST Communications, Inc. v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), cert. denied, 120 S. Ct. 2741 (Jun. 29, 2000).

Likewise, the Joint CLECS point out that the federal district court in Colorado rejected the notion that the Eighth Circuit's construction of the Act precluded other courts from adopting a different interpretation. US WEST Communications, Inc. v. Hix, Civ. Action No. 97-D-152, slip op. (D. Co. June 26, 2000). Like the Ninth Circuit, that court held that the fact that the Eighth Circuit had vacated certain FCC rules "does not compel the conclusion that" interconnection agreements incorporating those rules "are prohibited by the Act." Id. at 14. "Instead, the Court must question whether the interconnection agreements . . . are consistent with the Act, independent of [the FCC's rules]." Id. Moreover, on August 28, 2000, that court denied US WEST's Motion to alter the judgment on the basis of the Eighth Circuit's decision on remand in IUB III, correctly recognizing that the latter decision "is not a change in controlling legal authority." US WEST Communications, Inc. v. Hix, Civ. Action No. 97-D-152, Order Denying Motion to Alter or Amend Judgment (D. Co. Aug. 28, 2000).

In addition, the U. S. Court of Appeals for the Fifth Circuit has held that state commissions are not precluded by the federal Act from requiring ILECs to provide combinations of elements not ordinarily combined in the ILECs' networks. Southwestern Bell Telephone Company v. Waller Creek Communications, Inc., 221 F.3d 812 (Aug. 21, 2000 5th Cir.).

The Joint CLECs note that each of these federal court decisions was issued after the FCC rules that had required ILECs to combine separate elements not ordinarily combined in the ILEC's network were vacated by the Eighth Circuit. The Waller Creek decision was issued after the Eighth Circuit's recent decision in IUB III. The Waller Creek Court made clear that the Eighth Circuit decision had no bearing on the authority of commissions outside of the Eighth Circuit to order ILECs to combine network elements not currently combined in ILEC networks. Waller Creek, 221 F.3d 812, 821. Therefore, the Joint CLECs emphasize that even if one assumes that Ameritech Illinois' interpretation of the FCC's Rules and the Eighth Circuit opinion is literally correct (and the joint CLECs certainly do not contend that it is), such a view does not mean that the Illinois Commerce Commission cannot enforce a rational combinations policy through its own authority. Joint CLEC Reply Brief, p. 17.

Thus, the Joint CLECs contend that a state law or Commission Order requiring Ameritech to combine network elements for CLECs is not preempted by or in any way "inconsistent" with federal law. As an initial matter, AT&T and WorldCom argued in their post-hearing briefs in ICC Docket No. 98-0396 that federal law requires Ameritech to combine elements for CLECs that it ordinarily combines for itself – a conclusion adopted by the Proposed Order in that docket. Even if federal law did not otherwise impose that requirement, however, the relevant inquiry is not whether the federal Act requires Ameritech to provide such combinations but, rather, whether the federal Act affirmatively and expressly prohibits any requirement that Ameritech provide such combinations. Only then, the Joint CLECs contend, would it be inconsistent for the Illinois General Assembly and the Commission to impose such a requirement. Clearly, as the Fifth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the various federal courts addressing the same issue have concluded, a state requirement that ILECs provide network element combinations to CLECs is not preempted by or inconsistent with federal law. Joint CLEC Reply Brief, pp. 17-18.

The Joint CLECs emphasize that the Commission has the full authority under Illinois law to require Ameritech to combine UNEs. Section 13-505.5 of the Illinois Public Utilities Act ("IPUA"), 220 ILCS 5/13-505.5, provides ample authority for the Commission to order Ameritech to

provide unrestricted UNE-P. Joint CLEC Reply Brief, p. 18. Indeed, the Commission has relied on that specific provision in the past to require Ameritech to provide end-to-end network element bundling. See Platform Order, p. 64; TELRIC Order, p. 125.

Significantly, the Joint CLECs point out that Ameritech is already expressly required by recently enacted Section 13-801 of the Illinois Public Utilities Act to provide CLECs with combinations of network elements that it ordinarily combines for itself, and the Commission must adhere to this pronouncement. Staff Initial Br. at 64-65. Moreover, Staff is correct that if Ameritech believes that federal law preempts Section 13-801, it may petition the FCC under Section 253(d) of the federal Act to make that determination. Staff Initial Br. at 66. Ameritech has not done so. Indeed, given the fact that several federal district courts and federal Courts of Appeal have already determined that federal law does not preempt the states from requiring ILECs to provide new combinations, Ameritech's likelihood of success in arguing that federal law preempts the states in this area is weak at best. Joint CLEC Reply Brief, p. 18.

2. Ameritech's Reliance on The Erroneous Decision Of Verizon v. Strand Is Misplaced.

The Joint CLECs contend that Ameritech's reliance on Verizon North, Inc. v. Strand, 140 F. Supp. 2d 803 (W.D. Mich. Dec. 6, 2000) is misplaced since the opinion rests on a fundamentally flawed analysis that ignores the several decisions by the United States Courts of Appeal for the 9th and 5th Circuits that support the opposite conclusion on combinations. Joint CLEC Reply Brief, p. 19.

In Verizon North, Inc. v. Strand, Judge Bell of the United States District Court for the Western District of Michigan erroneously concluded that the Telecommunications Act of 1996 prohibits state commissions from requiring ILECs to provide access to new combinations of network elements. Specifically, Judge Bell erroneously considered whether the Act requires incumbents to provide new combinations of network elements, rather than whether the Act prohibits new combinations. Id.

Judge Bell's decision, the Joint CLECs note, is at odds with the decisions of several federal courts -- including two federal Courts of Appeal -- that have held that state commissions do not violate the Act by requiring incumbents to provide access to new combinations of network elements. See MCI Telecomms. Corp. v. U S West Comms., 204 F.3d 1262 (9th Cir. 2000), cert. denied, 121 S. Ct. 504 (Nov. 13, 2000); U.S. West Comms. v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), cert. denied, 120 S. Ct.

2741 (Jun. 29, 2000); Southwestern Bell Tel. Co. v. Waller Creek Comms., 221 F.3d 812 (5th Cir. 2000).

The Joint CLECs contend that the proper inquiry for a federal court reviewing a state commission ruling is not, however, whether the 1996 Act requires the result that the state commission reached, but rather whether the state commission's action violates the 1996 Act. See, e.g., Waller Creek, 221 F.3d at 821; MCI v. U.S. West, 204 F.3d at 1268; U S West v. MFS Intelenet, 193 F.3d at 1121. Applying that scope of review, in MCI v. U.S. West the Ninth Circuit considered whether the state commission violated the Act by requiring the incumbent to provide access to new combinations, and concluded that it did not. MCI Telecommunications Corp. v. US WEST Communications, 204 F.3d 1262, 1268 (9th Cir. 2000) ("Our task is to determine whether such a provision 'meets the requirements' of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not."); see also US West v. MFS Intelenet, 193 F.3d at 1121. Notably, the Supreme Court has denied petitions for certiorari on the Ninth Circuit's decisions in both MCI v. U.S. West and U S West v. MFS Intelenet.

In reaching his conclusion, the Joint CLECs note that Judge Bell relied on the Eighth Circuit's decision in IUB III. Judge Bell's reliance on IUB III was misplaced. That case vacated the FCC's rules requiring incumbents to provide new combinations on the grounds that the Act prohibits the requirement that incumbents provide new combinations of network elements. The Eighth Circuit's invalidation of the FCC's rules is binding nationwide pursuant to the Hobbs Act. However, the Joint CLECs emphasize that the Eighth Circuit's underlying interpretation of the Act is not binding beyond that circuit, and the Commission is free to interpret the Act as permitting states to impose on incumbents the obligation to provide new combinations of elements. This interpretation of the Act has been adopted by the Fifth and Ninth Circuits, which have held that, while the 1996 Act may not require incumbent carriers to provide access to new combinations of network elements, nothing in the Act prohibits state commissions from ordering incumbents to provide access to new combinations. Joint CLEC Reply Brief, pp. 20-21. Indeed, the Joint CLECs note that the Michigan Public Service Commission issued an order after the Verizon North opinion was issued in which the Commission required Ameritech to combine for CLECs network elements that Ameritech ordinarily combines in its network. Michigan Case No. 12320, Opinion and Order (Jan. 4, 2001), pp. 9-10.

The Joint CLECs urge the Commission to not be swayed by Ameritech's pre-emption arguments. Id. Simply put, the Commission must order Ameritech to combine for CLECs UNEs that Ameritech ordinarily combines in its network for itself. There is ample legal authority – both federal and state -- to do so.

Commission Analysis and Conclusion

The issue of whether Ameritech is required to provide CLECs with combinations of network elements that it ordinarily combines for itself, including combinations of network elements enabling the requesting CLEC to provide service to customers desiring an additional line or moving to a new location, is one that we have already recently decided in our Order dated October 16, 2001, in ICC Docket No. 98-0396. In that Order, we expressly concluded that:

> We agree with AT&T, MCI WorldCom and Z-Tel that we have the legal authority to order Ameritech to provide combinations of unbundled network elements ordinarily combined in Ameritech's network, and that public policy not only supports, but commands, that we require Ameritech to provide such combinations if we are to promote mass market competition for residential and small business customers in Illinois. We therefore require Ameritech to provide to CLECs combinations of unbundled network elements that Ameritech ordinarily combines for its own use or for the use of its end user customers, including the unbundled network element Platform and Enhanced Extended Links, or EELs. This includes, of course, providing the UNE-Platform to CLECs for the purpose of serving new lines and additional, or second, lines to their customers. Given that Ameritech ordinarily combines these elements in its network for its own use or for the use of its end user customers, we find that there are no legal or technical impediments to requiring Ameritech to provide the UNE-Platform for new and second lines.
>
> Our conclusion is supported both by the law and the overwhelming record evidence. We have long recognized the competitive significance of the UNE Platform and are aware of the fact that the market entry plans of UNE-Platform CLECs, including AT&T, MCI WorldCom and Z-Tel, may very well hinge upon their ability to serve new and additional lines via the UNE-Platform. We acknowledge the obvious fact that the market for new and second lines is significant, and that the ability of CLECs to serve these lines

is critical to their ability to fairly compete with Ameritech. We also agree that there is no legitimate policy reason for protecting this market segment from competition, and that it would be unjust, unreasonable and discriminatory to freeze CLECs out of this significant market. Nor will we deny the benefits of local competition to those customers that are new to a location or who, like many other customers, desire additional lines to their home or place of business. If a customer has chosen a local service provider, we will honor that choice for all the customer's lines, not just those lines that were previously served by the incumbent LEC.

Moreover, Section 13-801(d)(3) of the Illinois Public Utilities Act, added by House Bill 2900 or PA 92-22 on June 30, 2001, expressly requires Ameritech to "combine any sequence of unbundled network elements that it ordinarily combines for itself." In addition, Section 13-505.5 of the Illinois Act gives us the authority to require Ameritech to provide end-to-end unbundling – authority we did not hesitate to use in our Platform Order and our TELRIC Order.

We find no reason to revisit the issue here. We agree with the various federal Courts of Appeal and federal district courts that the state of Illinois has the authority to order Ameritech to provide new combinations of network elements, and that such a requirement is not preempted by federal law. To the contrary, various provisions of the federal Act, including Section 251(d)(3) and Section 261(c). Accordingly, we reaffirm Ameritech's obligation to provide CLECs with new combinations of network elements to provide service to end users, including, but not limited to, the UNE-Platform or serve new and second, or additional, lines.

Exception No. 5 The Proposed Order Improperly Finds that Transiting is Beyond the Scope of this Proceeding

The Proposed Order finds that:

Finally, a number of issues not specifically addressed by the initiating [sic, Order?] were raised by various parties. The first issue involves transiting over ULS-ST. "Transiting" refers to the function of acting as a go-between for calls between customers of other carriers. The CLECs and Staff request that transiting be made a mandatory part of ULS-ST. Ameritech argues that transiting cannot be mandatory part of ULS-ST, although it voluntarily offers transiting as part of ULS-ST today. Similarly, we find that transiting as part of ULS-ST was not one of the issues designated for investigation and therefore is beyond the scope of this case.

Proposed Order at 27.

This cannot be supported. As is clear from the evidence adduced in this proceeding, transiting – the function of acting as a go-between for calls between customers of other carriers – is a vital component of ULS-ST. It is clear that a good many calls – and presumably a greater number as competition develops – will have to "transit" Ameritech's network. Requiring CLECs to replicate this infrastructure – for this purpose and this purpose alone – is anticompetitive and economically absurd. Moreover, the Commission has already ordered Ameritech to provide transiting; reaffirmation of the obligation in this order will remove any ambiguity regarding Ameritech's obligations. This is particularly important in light of Ameritech's contention that it has no obligation to provide transiting – notwithstanding a Commission Order requiring precisely that. Accordingly, the Commission should make the transiting obligation crystal clear.

Consistent with this, the Staff recommends the following amendments to the Proposed Order:

> Finally, a number of issues not specifically addressed by the initiating were raised by various parties. The first issue involves transiting over ULS-ST. "Transiting" refers to the function of acting as a go-between for calls between customers of other carriers. The CLECs and Staff request that transiting be made a mandatory part of ULS-ST. Ameritech argues that transiting cannot be mandatory part of ULS-ST, although it voluntarily offers transiting as part of ULS-ST today. ~~Similarly, we find that transiting as part of ULS-ST was not one of the issues designated for investigation and therefore is beyond the scope of this case.~~
>
> The parties advance the following arguments:
>
> Transiting as part of ULS-ST
>
> Ameritech position

"Transiting" refers to the function of acting as a go-between for calls between customers of other carriers. The CLECs and Staff request that transiting be made a mandatory part of ULS-ST. Ameritech Illinois argues that transiting cannot be mandatory part of ULS-ST, although it voluntarily offers transiting as part of ULS-ST today.

The Joint CLEC Position

The Joint CLECs urge the Commission to reaffirm Ameritech's obligation to provide transiting. A carrier purchasing ULS-ST relies on shared transport to terminate its intraLATA traffic. Most of this traffic terminates to subscribers served by Ameritech end-offices. However, Mr. Gillan noted that some calls will go to customers served by other CLECs that have installed their own end-office switches. To complete these calls in the most efficient manner, he explains that it is important that shared transport include termination to all end-offices, Ameritech and CLEC alike. When shared transport terminates at a CLEC end-office, Ameritech refers to this arrangement as "transiting" or "transit" – i.e., the call "transits" the Ameritech network, and terminates on the network of another LEC. Joint CLEC Ex. 1.0, pp. 27-28.

Mr. Gillan testified that in the context of shared transport – where Ameritech provides transit between Ameritech local switches (albeit purchased as ULS) and CLEC switches -- the case for mandatory transit is even stronger. The "very essence" of shared transport is providing CLECs access to the scale economies of the interoffice network, with calls routed to their termination in accordance with the standard routing tables in the end-office switch. Mr. Gillan emphasized that requiring transit as a mandatory component of shared transport is vital to avoiding "fine distinctions between types of traffic" that would simply "create inefficiencies, raise costs and erect barriers to competition." Joint CLEC Ex. 1.0, p. 30.

Mr. Gillan pointed out that the Commission has previously ordered Ameritech to provide transiting. First, in the MCI arbitration, the Commission made clear that Ameritech must offer transit to CLECs in Illinois, even if a parallel obligation did not exist under federal law. Order, ICC Docket No. 96-AB-006, December 17, 1996, p. 19. The Commission reached this determination in the context of requiring Ameritech to provide an intermediary transit function between different CLEC switches. Id. at 19.

Mr. Gillan also pointed out that the Commission confirmed Ameritech's obligation to provide transiting generally in its TELRIC Order. In that Order, the Commission directed Ameritech "to include transiting language in its compliance tariff and provide supporting cost studies.

TELRIC Order, p. 107. The Joint CLECs urge the Commission to reaffirm this obligation and Ameritech's other shared transport obligations by adopting the CLEC redlined version of Ameritech's ULS-ST tariff admitted into the record as Joint CLEC Ex. 2.2 as part of its Order in this proceeding.

Staff Position

Ameritech contends that, although it voluntarily provides transiting, it is not legally obligated to do so as a part of shared transport. Ameritech Ex. 1.1 at 13-14 (Hampton). Ameritech's positioning, however, is not correct, and the Commission should order Ameritech to provide transiting as a part of its shared transport offering.

It is difficult to determine precisely how Ameritech reached the conclusion that it is under no obligation to provide transiting with its shared transport offering. In 1996, the Commission ordered Ameritech to provide transiting, concluding that:

> Ameritech Illinois' positions, particularly as expressed in its Brief on Exceptions, are inconsistent with prior Commission Orders, including our discussion of the transiting issue in Docket 96 AB-006[8]. We note that in this proceeding Ameritech Illinois witness O'Brien expressed Ameritech Illinois' commitment to include a transiting feature in its End Office Integration Tariff, which would describe the features, terms and conditions as well as prices for the service. We direct Ameritech Illinois to include transiting language in its compliance tariff and provide supporting cost studies.
>
> TELRIC Order at 106-7 (citations omitted).

Likewise, in its Order approving the SBC / Ameritech Merger, the FCC ordered Ameritech to provide transiting, stating as follows:

> SBC/Ameritech shall not require use of dedicated transport or customized routing to complete all calls using local switching and shared transport. SBC/Ameritech shall make available a modified version of transiting that does not require a dedicated end office integration ("EOI") transit trunk. No later than the Merger Closing Date, SBC/Ameritech shall withdraw Ameritech's proposal for the Commission to establish a separate transit service rate to be charged in conjunction with shared transport (as described in Ameritech's March 25, 1999, ex parte filing in CC Docket No. 96-

[8] The Commission ordered Ameritech to provide transiting in ICC Docket 96 AB 006, an arbitration between WorldCom (then MCI) and Ameritech. *See* Final Order at 19, ICC Docket No. 96 AB 006 (December 17, 1996).

98). (FCC SBC/Ameritech Merger Order, FCC 99-279, ¶ 55(a) of Appendix C.)

It is clear, therefore, that the Commission need not consider Ameritech's claim that it is under no obligation to provide transiting. Both the Commission and FCC have clearly directed it to do so. The Commission should not depart from its ruling in the TELRIC Order.

Commission Conclusions

Finally, we take this opportunity to reaffirm Ameritech's obligation to provide transit service, or transiting, to CLECs. It is apparent to us that if competition is to develop, transiting must be offered as a part of ULS-ST. While we are of the view that our TELRIC Order clearly imposes that obligation upon Ameritech, we will, as the Michigan Commission recently did, reaffirm Ameritech's obligation to provide transiting and to maintain transiting in its tariffs. We further observe that, to the extent that Ameritech believes that it is under no legal obligation to offer transiting in Illinois, it is entirely mistaken.

WHEREFORE, for all of the foregoing reasons, we request the Administrative Law Judge accept Staff's recommendations in their entirety as set forth herein.

Respectfully Submitted:
Staff of the Illinois Commerce Commission

BY: _____
One of Its Attorneys

MATTHEW L. HARVEY
DAVID A. NIXON
MARGARET T. KELLY
MARY J.STEPHENSON
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601

T: (312) 793-2877
F: (312) 793-1556

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